IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Case No. CR-16-01438
CR-16-01524
CR-17-01172

DIRECTOR OF PUBLIC PROSECUTIONS

v

MARK WHITTINGHAM

JUDGE:	HIS HONOUR JUDGE TRAPNELL
WHERE HELD:	Melbourne
DATE OF HEARING:	7-8 February, 7 May 2018 (Plea), 26 October 2018 (Change of plea application), 8 February 2019 (Ruling on change of plea) 15 February 2019 (Ruling on deferral of sentence)
DATE OF SENTENCE:	7 March 2019
CASE MAY BE CITED AS:	DPP v Whittingham
MEDIUM NEUTRAL CITATION:	[2019] VCC 313

REASONS FOR SENTENCE

Subject: CRIMINAL LAW – Sentence

Catchwords: 16 charges of obtain financial advantage by deception – Offending over 42 months – Purported sale of insurance register trail books and rent rolls without authority or which were non-existent – False representations that monetary deposits paid could be fully refunded – Multiple non-corporate victims – Fraudulent credit account applications – Total amount obtained $744,877 – Victims' total losses $528,070 – 49 year old offender – No prior convictions but subsequent offending and offending whilst on bail – Pleas of guilty entered at the earliest forensically reasonable time – Sophisticated offending to support extravagant lifestyle – Serious breaches of trust – High moral culpability – Some delay attributable to offender's applications to change plea and deferral of sentence and subpoenas issued – Custodial hardship – Cautious approach to rehabilitation – Significant weight given to specific deterrence and community protection – Totality principles applied – Sentenced as a continuing criminal enterprise offender on five charges

Legislation Cited:	*Bail Act 1977* s 30B; *Crimes Act 1958* ss 82(1); *Marine Safety Act 2010* s 305(1)(a); *Sentencing Act 1991* ss 5(4), 6J, 16(1A)(e), 16(3C), 18(2)(d)
Cases Cited:	*Atholwood v The Queen* (1999) 109 A Crim R 465; *Cameron v The Queen* (2002) 209 CLR 339; *DPP (Cth) v Gregory* (2011) 34 VR 1; *Mill v The Queen* (1988) 166 CLR 59; *Pedersen v The Queen* [2013] VSCA 321; *R v Arundell* [2003] VSCA 69; *R v Broad* [1999] 3 VR 31; *R v Machtas* (1992) 62 A Crim R 179; *Tsang v The Queen* (2011) 35 VR 240
Sentence:	Total effective sentence of 5 years' imprisonment with a non-parole period of 3 years and 4 months' imprisonment

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APPEARANCES:	Counsel	Solicitors
For the DPP	Mr M Gibson S.C. with Mr A McKenry (7-8 February 2018)	Mr J Cain, Solicitor for Public Prosecutions
	Mr M Gibson S.C. (7 May 2018 and 7 March 2019)	
	Mr M Cookson (26 October 2018 and 8 and 15 February 2019)	
For the Accused	Mr P Skehan with Ms S Bruhn (7-8 February 2018)	Furstenberg Law
	Mr A Furstenberg (7 May 2018)	Furstenberg Law
	In person (26 October 2018 and 15 February 2019)	
	Mr N Howard (8 February and 7 March 2019)	Giorgianni & Liang Lawyers

HIS HONOUR:

1 Mark William Whittingham, you have pleaded guilty to a total of 16 charges of obtaining financial advantage by deception.[1] This is comprised of three indictments, the first containing 2 charges (**'Weir Insurance Register Trail Book matter'**),[2] the second containing 7 charges (**'Rent Roll matter'**)[3] and the third containing 7 charges ('**Loan Trail Book and Westpac matters'**).[4]

2 In most cases the maximum penalty for this offence is 10 years' imprisonment.[5] However, you fall to be sentenced as a continuing criminal enterprise offender on charge 4 on indictment no F10472832.2AA (the Taylors Real Estate Agents matter) and charges 1, 5, 6 and 7 on Indictment no. G10711001.1 (the Augello loan trail book and most of the Westpac matters).[6] This means that on those charges you are liable to a maximum term of imprisonment of 20 years. This does not mean that I must 'automatically' impose a higher sentence on you on those charges.[7] Rather, it is a guide to the seriousness of those offences and it needs to be taken into account, along with other factors, in arriving at a proper sentence on those charges.[8]

3 You have also consented to having two related summary charges transferred to this Court,[9] namely single charges of obtaining a Victoria marine licence by

[1]Contrary to s 82(1) *Crimes Act 1958*.

[2]Charges 34 and 35 on Indictment F10472832.1B (CR-16-01438). On 6 February 2018, during a trial before a jury, Mr Whittingham was re-arraigned before the jury and pleaded guilty to these charges; whereupon, the Crown informed me that it proposed not to lead evidence on charges 1 to 33 and 36 (inclusive). Pursuant to s 141 of the *Criminal Procedure Act 2009* I discharged the jury from delivering verdicts on all charges on the Indictment and directed that an entry of guilty be made on the record in respect of charges 34 and 35 and I further directed that an entry of not guilty be made on the record in respect of the remaining charges on that Indictment.

[3]Charges 1-7 on Indictment F10472832.2AA (CR-17-01172).

[4]Charges 1-7 on Indictment G10711001.1 (CR-16-01524).

[5]Pursuant to s 82(1) *Crimes Act 1958.*

[6]*Sentencing Act 1991* Part 2B and Schedule 1A.

[7]*R v Arundell* [2003] VSCA 69 [28]–[29] (Vincent JA, Phillips CJ and Cummins AJA agreeing); *R v Grossi* (2008) 23 VR 500, 512–3 [44]–[45] (Redlich JA, Vincent JA agreeing), 507 [28] (Neave JA); *R v Faneco* [2009] VSCA 110 [18] (Maxwell P)

[8]*Pedersen v The Queen* [2013] VSCA 321 [69] (Priest JA, Maxwell P and Coghlan JA agreeing) citing *Markarian v The Queen* (2005) 228 CLR 357.

[9]Pursuant to s 145 *Criminal Procedure Act 2009*.

making a false statement[10] and committing an indictable offence whilst on bail.[11] You pleaded guilty to these offences. The maximum penalties are 60 penalty units[12] and 3 months' imprisonment[13] respectively.

4 The Facts

5 Weir Insurance Register Trail Book matter (Indictment F10472832.1B)

6 The two charges on this indictment relate to offending whereby you purported to sell an insurance register trail book for a price you knew was below that which you had authority to sell it for. On the strength of a number of representations, two deposits were paid by Mr Jason Weir, a prospective buyer, into a bank account for the supposed purchase of that asset. You then used those deposit monies for your own purposes and in turn failed to refund those monies as your had promised to do.

7 This matter formed part of a wider investigation, codenamed Operation Calcitic, by Victoria Police in response to complaints by mortgage brokers Jason Weir, Giuseppe Augello, Greg Samuel, Andrew Moore and Luke Starr, together with a number of real estate agents.

8 The asset concerned in this matter was an insurance register trail book stream of income. The insurance register trail book is the renewal income that is received by a broker from putting personal insurance in place for clients. For placing personal insurance a broker receives an upfront commission and then every year the broker receives an additional amount of 'trailing income'. This amount is a percentage of the annual premium paid for the insurance. The commission is paid by insurance companies to the broker's 'dealer group'. That dealer group then forwards the commission less their fees to the broker on a monthly basis.

[10]Summary charge 2, contrary to s 305(1)(a) *Marine Safety Act 2010.*
[11]Summary charge 10, contrary to s 30B *Bail Act 1977.*
[12]Pursuant to s 305(1) *Marine Safety Act 2010.*
[13]Pursuant to s 30B *Bail Act 1977.*

9 When a broker sells an insurance register trail book, the broker is selling the right to receive this trailing income to another person, the buyer, to look after the clients and receive the trailing commission. The buyer is effectively purchasing a client list and the trailing commission. In that sense, it operates in a similar way to a loan trail book where a collection of client loans are sold, giving the buyer a trailing commission and a client list.

10 In this case, David Wilkins owned an insurance register trail book. In July 2012, you advertised on a website that your company, Buy a Trail, bought and sold trail books. During initial discussions, you and Mr Wilkins discussed how you would be paid in the event that you were able to find a buyer for Mr Wilkins' insurance register trail book. You told him that you would be paid a percentage of the sale price to be deducted from the sale proceeds. You were to manage the negotiations, find the potential buyer and handle all the money relating to the sale.

11 An agreement was reached between you and Mr Wilkins that the sale price was to be a price equivalent to a multiple of three to three and a half times the annual renewal income of the insurance register. At your request, Wilkins supplied you with a copy of 'Summary of current insurance policies in force as at 16th July 2012'. This document clearly showed the annual renewal income figure to be $100,942.00.

12 You had Mr Wilkins' authority to sell the insurance register trail book for an amount between $302,826.00 and $353,297.00, being three to three and a half times $100,942.00. You did not have his authority to sell below this range and certainly not for a price of $253,364.00. That figure is 2.51 times the $100,942.00, which is a much lower figure than that which Mr Wilkins had instructed or authorised you to sell at.

13 The victim in this matter, Jason Weir, was a finance broker operating a business named 'Greater Brisbane Financial Services' in Aspley, Queensland.

In July 2012, Mr Weir was interested in purchasing a financial planning book specifically with clients in the Brisbane area. He made enquiries of you believing you to act as a business broker.

14 Mr Weir sent an email to you which detailed the type of business he was interested in purchasing. In particular, he was looking to purchase a mortgage book or financial planning book, with recurring revenue of between $20,000 and $150,000 per annum, and preferably with clients located within Brisbane and up to 150 km north of Brisbane.

15 You emailed Mr Weir in response to his enquiry, and you provided him with an enquiry agreement to be signed before any financial planning book information was provided. Clause 9 of the agreement provided:

> If the offer is accepted a deposit is to be paid… This is fully refundable should you wish to pull out up until contract stage… at that point… and the balance of the deposit would be returned.

16 Clause 11 of the agreement provided:

> Refund of deposits are made within a 30 day period.

17 Mr Weir signed this enquiry agreement as an acknowledgement of its terms and returned the document to you. You then sent him documentation to peruse, which included two sample loan trail books, Plan 576 and Life Book SE QLD. This had the effect of adding authenticity to the transaction. The sample Life Book SE QLD was the same as the document headed 'Summary of current insurance policies in force as at 16th July 2012,' which Mr Wilkins had previously provided you.

18 You emailed Mr Weir informing him of a number of matters including that a meeting would be arranged with the selling broker, that the deposit would be held in a solicitor's trust account for larger books, and that any deposit would be fully refundable in the event that he decided to withdraw from the purchase.

19 Mr Weir believed that any monies he paid by way of deposit would be fully refundable in the event he decided not to proceed with the purchase of a financial planning book.

20 Negotiations were entered into regarding the purchase by Mr Weir of the Life Book SE QLD insurance register trail book. Mr Weir agreed to purchase the financial planning book for $254,364.00 plus GST, or 2.51 times the annual gross revenue commission of $100,942.00. As part of the purchase agreement Mr Weir had to pay a deposit equal to $13,934.80 inclusive of GST.

21 A few days later, you sent an email to Mr Weir attaching an invoice which sought the deposit in the amount of $13,934.80. A 'terms letter' accompanied the invoice and was personally addressed to Mr Weir. Included in that letter was a statement that 'the agreed deposit is fully refundable should you decide to withdraw at any time up until settlement'.

22 Based on your representations that you were legitimately acting on behalf of the owner of the financial planning book and you were in a position to sell it at the agreed price of $253,364.00 and that any deposit would be fully refundable if the sale did not go ahead, Mr Weir paid the deposit in two instalments. But for these representations he would not have made those payments.

23 The Crown submitted that the gravamen of your offending is that you knew you did not have the authority to sell the trail book at the price you purported to sell it at and that you knew at the time the deposit was paid by Mr Weir that you would not be able to refund that money in the event that the purchase did not proceed.

24 On 25 July 2012, Mr Weir paid a deposit of $5,000 into your Suncorp bank account (Charge 34). The next day he paid the balance of the deposit of $8,934.80 into the same account (Charge 35). You withdrew those monies

from your Suncorp bank account over the next two days and spent them.

25 A meeting was set up with the owner of the financial planning book (Life Book SE QLD). The owner was David Wilkins of Superior Investment Strategies. Mr Wilkins was unaware of the purported sale of his insurance register trail book by you. He did not authorise its sale. You did not advise him of the reduced price at which you purported to sell it.

26 On 31 July 2012, Mr Weir and his father met with Mr Wilkins at his office in Springwood, Queensland. During the meeting Mr Weir established that Mr Wilkins was unaware that Mr Weir and you had agreed to a purchase price of $253,364, that the purchase price Mr Weir had negotiated with you was a lot less than what Mr Wilkins was prepared to sell for and that Mr Wilkins was not aware that Mr Weir had already paid a deposit of $13,934.80 to you.

27 As a result of this discovery Mr Weir was unable to finalise the sale. After the meeting he sought a full refund of the deposit from you in accordance with the previous representations that you had made. You agreed to refund the deposit. You sent him a 'refund document' for him to sign and return, which he did. Despite this, you failed to refund the deposit monies to Mr Weir. The amount of Mr Weir's loss is $13,934.80, which remains outstanding.

28 *Rent Roll matter (Indictment F10472832.2AA)*

29 There are seven charges on this indictment relating to four victims. Between January and June 2013, you purported to sell an asset you either had no authority to sell or which did not exist. On the strength of a number of representations made by you, deposits were paid by unsuspecting prospective buyers into a bank account for the purchase of the purported asset. You used these deposit monies for your own purposes.

30 In this matter, the assets you were purporting to sell to prospective buyers were rent rolls. Rent rolls are the list of rental properties managed by a real estate agency. You would represent that you had a rent roll available to sell in

a particular geographical area and would accept payment of a deposit from the prospective buyer. You would then represent that you would set up a meeting with the owner of the rent roll in order for due diligence to be carried out. These meetings never eventuated because you either did not have authority to sell the particular rent roll or the asset did not exist.

31 The result was that, through this series of false representations, you were able to obtain funds deposited into your nominated bank account by the unsuspecting prospective buyers. But for your false representations the funds would never have been paid to you.

32 Charge 1

33 The first victim in this fraudulent scheme was Vassili Spiroglu, a licensed real estate agent who operated a business in Edithvale. In January 2013 he began receiving unsolicited emails from a company operated by you which advertised rent rolls for sale.

34 Mr Spiroglu made enquiries with you about purchasing a rent roll in the Chelsea area. You contacted him and represented yourself as a broker who was selling rent rolls on behalf of real estate agents. You emailed a response back to Mr Spiroglu stating that you had a rent roll in his area for sale. You also sent documentation, including an 'enquiry agreement' for him to peruse regarding the sale of the rent roll. This had the effect of adding authenticity to the transaction. Mr Spiroglu signed the agreement and returned it to you.

35 It was implicit from the agreement that you had a rent roll for sale. The enquiry agreement contained a number of terms and conditions which included:

(a) if an offer for a rent roll was accepted by the seller, then a deposit equal to 20% of the purchase price had to be paid on the same day of acceptance;

(b) the deposit was fully refundable up until the contract stage. If the matter progressed and contracts were drawn up, then a fee of $2000.00 would apply and the balance of the deposit would be returned;

(c) the deposit … is held in a solicitor's trust account for larger books;

(d) Refund of deposits are made within a 30 day period.

(e) Once the deposit was paid, a meeting would be set up to go through the client files and to have a general chat to the seller about his or her business.

36 You provided a sample rent roll for Mr Spiroglu to examine. He asked you for the purchase price. You responded by telephone and gave him the following false information:

(a) The rent roll was owned by an elderly real estate agent.

(b) The seller had been running a real estate agency for 35 years.

(c) The seller had been operating out of the same premises for the last 15 years and was keen to retire.

(d) The properties listed on the rent roll were in Parkdale, Mentone, Mordialloc, Aspendale and Chelsea.

(e) The purchase price of the rent roll would be between 2 – 2.5 times the yearly income of the rent roll which was $203,445.79.

(f) The price was negotiable as the seller's property manager had just left him after looking after his rental properties for the past 10 years.

37 Negotiations followed and Mr Spiroglu, believing a legitimate rent roll for the bayside area was for sale, offered to purchase the rent roll for $440,000.00 plus GST. You required the payment of $24,200.00 by way of deposit.

38 You purported to accept the offer on behalf of the seller, and you said that a meeting would be arranged with the seller and any deposit paid would be fully refundable in the event that Mr Spiroglu decided to withdraw from the purchase. You forwarded him a tax invoice for the deposit amount.

39 Over the next 24 hours Mr Spiroglu questioned the validity of your claim that you were a licensed broker. You assured him that you were and on 12 January 2013 Mr Spiroglu paid the deposit of $24,200.00 into your nominated bank account.

40 You withdrew these monies on the 15 January 2013 leaving a zero balance in your company's account.

41 The next day you sent Mr Spiroglu a document entitled 'Rent Roll Sale Info 17'. The document falsely reiterated information about the rent roll.

42 All attempts to meet the seller proved unsuccessful because there was no genuine seller. You made various excuses and you failed to provide Mr Spiroglu with any evidence that the rent roll was actually for sale.

43 On 24 January 2014, Mr Spiroglu advised you that he did not want to proceed with the purchase and he sought a refund of the deposit. You falsely stated to him that the refund monies had been forwarded to him. In fact you made no repayments.

44 Mr Spiroglu reported the matter to Consumer Affairs Victoria, who made an order that you repay Mr Spiroglu his deposit monies. This amount of $24,200.00 remains outstanding.

45 Charges 2 and 4

46 The victim of these offences, Mr Enzo Bufano, was a real estate agent operating in Delahey. He also received an unsolicited email from you advertising rent rolls for sale. He made enquiries with you concerning the purchase of the two rent rolls in Melbourne. You purported to be an agent legitimately selling rent rolls on behalf of real estate agents.

47 You sent Mr Bufano documentation to peruse regarding the sale of the two rent rolls. This included an enquiry agreement and some sample rent rolls. You advised Mr Bufano that a meeting with the selling agent would be arranged as soon as possible, and that any deposit monies paid would be fully refundable in the event that he decided to withdraw from the purchase.

48 Negotiations were entered into in relation to one of the rent rolls, which you said was for properties in the Essendon and Moonee Ponds area. Mr Bufano made an offer to purchase the rent roll, believing it to be a legitimate rent roll which was genuinely for sale. You accepted the offer, purportedly on behalf of

the seller. You told him that a deposit of $14,744.76 was required, which would be fully refundable, and that a meeting would be set up with the vendor so that due diligence could take place. You forwarded a tax invoice for the deposit amount.

49 On 31 January 2013, Mr Bufano paid $14,774.76 into your nominated bank account. You withdrew this money the following day.

50 A meeting was arranged for 7 February 2013 with the supposed owner of the rent roll. You told Mr Bufano that Simone Bullen Real Estate in Moonee Ponds was the owner of the rent roll, however Ms Bullen had never had any dealings with you and her rent roll was not for sale. These facts and circumstances give rise to charge 2 on the indictment.

51 Some days later, you told Mr Bufano that there was another rent roll for sale in the St Albans/Sunshine area. As before, you provided information which added authenticity to the transaction. An offer was made by Mr Bufano, and you made the same representations about refundable deposit and meeting with the owner for the purposes of due diligence as before.

52 This rent roll was in fact owned by Simon Thomas of Connection Realty Real Estate in Albany, Western Australia. In 2012, he had provided a copy of the rent roll to you as he had been looking to sell it. However, his dealings with you ceased and you were no longer authorised to sell the rent roll.

53 You sent a tax invoice to Mr Bufano for the deposit monies in the sum of $121,095.46. Mr Bufano paid the deposit into you nominated bank account on 5 February 2013. A number of substantial withdrawals were made over the next three days and by 8 February 2013 the account balance was zero.

54 All attempts by Mr Bufano to meet with the supposed owners of the two rent rolls were unsuccessful. He sought a refund of his deposits, which led you to engage in a number of subterfuges. You gave the appearance that you were

making arrangements to refund the deposits. You proffered excuses for the delay in their refund and eventually nothing came of your excuses. These facts and circumstances give rise to charge 4 on the indictment.

55 Mr Bufano's total loss of $135,870.22 consisting of the two deposit amounts remains outstanding.

56 Charge 3

57 Ms Patricia-Anne Monk was a real estate agent operating a business in Wolffdene in Queensland. In January 2013, she was looking to buy a rent roll in the Gold Coast area. She made enquiries with you about a rent roll from south east Queensland that you had for sale.

58 On 21 January 2013, you contacted Ms Monk and purported to be selling a rent roll on behalf of real estate agents. You sent her an enquiry agreement and advised that in the event an offer was accepted a deposit would be required. This would be held in trust and would be fully refundable if the sale did not proceed. You also advised her that a meeting would be arranged with the seller and their contact details would be provided once the deposit was paid.

59 You sent Ms Monk two sample rent rolls for her to peruse in an attempt to add authenticity to your authority to sell the rent rolls. You said that the rent rolls were in the Southport area. Negotiations were conducted and you confirmed that a full refund of any deposit that was paid would be effected if the purchase fell through.

60 Ms Monk offered to purchase one of the rent rolls and you accepted her offer. The name of the seller would be withheld until after the deposit was paid. You sent a tax invoice for the amount of $37,261.25, being the amount of the required deposit. You confirmed that the deposit would be held in trust until settlement occurred and the deposit was fully refundable.

61 On 5 February 2013, Ms Monk paid the deposit amount into your nominated bank account. You withdrew all of this money and spent it.

62 Arrangements to meet the owner of the rent roll came to nothing, whereupon you proffered excuses. You failed to provide any evidence that the rent roll was actually for sale. Three days later, Ms Monk sought a refund of the deposit but no refund was forthcoming. The amount of $37,261.25 remains outstanding.

63 Charges 5, 6 and 7

64 The victim of these charges, Mr Andrew Amos, was a real estate agent operating a business in Noosaville, Queensland. He also received unsolicited emails from you advertising rent rolls for sale and he made enquiries with you about purchasing a rent roll on the Sunshine Coast.

65 You contacted Mr Amos and purported to be an agent legitimately selling rent rolls on behalf of real estate agents. You sent him documentation to peruse regarding the sale with terms and conditions to add authenticity to the transaction. You advised Mr Amos that a meeting with the selling broker would be arranged, the deposit would be held in trust, and any deposit paid would be fully refundable in the event he withdrew from the purchase.

66 You sent Mr Amos a rent roll as a sample with supporting financial information. This was meant to be in the area of the Sunshine Coast. Negotiations were entered into and an offer was made which you purported to accept on behalf of the owner of the rent roll. A deposit was sought in the amount of $14,785.35.

67 On 22 May 2013, Mr Amos paid a deposit of $14,785.35 into your nominated bank account. These deposit monies were transferred into other accounts as well as withdrawn from an ATM and various retail purchases were made by you. You also withdrew monies from the account and spent this on bills and other expenses.

68 Mr Amos discovered that the actual owner of rent roll 75 was using another agent to sell her rent roll, and was not using you. Mr Amos sought a refund of the deposit to which you agreed. Despite this, no refund was forthcoming. These facts and circumstances give rise to charge 5.

69 You sent Mr Amos another sample rent roll which he decided to purchase in place of the pervious rent roll. A deposit of $39,452.60 was required, and it was agreed the previous unrefunded deposit of $14,785.35 would be offset against this amount leaving a balance of $24,667.25.

70 On 31 May 2013 and 3 June 2013, Mr Amos paid the outstanding deposit into your nominated bank account in two instalments of $20,000 and $4,667.25. Once again, these funds were expended by you almost immediately.

71 Mr Amos decided not to proceed with the purchase of this second rent roll and he sought a refund of $39,452.60. Between 18 June 2013 and the 5 July 2013 you made repayments to Mr Amos totalling $24,890.52. Accordingly his loss was $14,562.08. These facts and circumstances give rise to charges 6 and 7.

72 The total amount defrauded by you in the transactions covered by this indictment is $236,784.07 and $211,893.55 remains unrefunded by you.

73 *Loan trail book matter (Indictment G10711001.1 – Charges 1, 2 and 3)*

74 In charges 1 to 3 on this indictment you followed a similar modus operandi as in the rent roll matters. You would represent that you had a loan trail book for sale and you would accept payment of a deposit from the prospective buyer. You then represented that you would set up a meeting with the owner of the loan trail book in order for due diligence to be performed. These meetings never eventuated because you either did not have authority to sell the loan trail book or the asset did not exist.

75 The ultimate result was that through a series of false representations you were able to obtain monies which were deposited into your nominated bank

account by the unsuspecting prospective purchasers. But for these false representations, the prospective buyers would not have paid over these monies.

76 Charge 1

77 Mr Giuseppe Augello was a finance broker operating a business in Queensland. In August 2013, he received an unsolicited email from you advertising loan trail books for sale. Mr Augello made enquiries about purchasing such a book in Brisbane.

78 You purported to be legitimately selling loan trail books on behalf of mortgage brokers. You sent Mr Augello documentation to add authenticity to the transaction, including an 'enquiry agreement'. You made false representations, including that the deposit would be fully refundable in the event Mr Augello decided not to proceed with the purchase.

79 You sent a sample loan trail book to Mr Augello and provided false details regarding the owner. You also falsely stated that the owner required money urgently as a result of a life threatening condition he was suffering. Mr Augello made an offer to purchase this loan trail book, which you accepted, requiring him to pay a 20% deposit in the sum of $50,000.00.

80 In response to a request from Mr Augello for further details, you sent an email purporting to be Mark Clayton from Port Melbourne. You forwarded a tax invoice for $50,000, which Mr Augello paid into your nominated bank account. You applied these funds towards the payment of a deposit on a residential property you were purchasing under a terms a contract of sale.

81 Meanwhile, Mr Augello's attempts to meet the seller of the loan trail book were unsuccessful as the person did not exist. You failed to provide any evidence that the loan trail book was genuinely for sale. Despite Mr Augello's request for a refund of his deposit no refund was forthcoming. The $50,000 remains unpaid.

82 Charge 2

83 The victim in this matter, Greg Samuel, was a finance broker operating a business in Adelaide. Between December 2014 and January 2015, he received unsolicited emails from you advertising loan trail books for sale. Mr Samuel made enquiries of you and you purported to be an agent legitimately selling loan trail books on behalf of mortgage brokers.

84 You sent Mr Samuel documentation to add authenticity to the transaction, which included four loan trail book statements purporting to represent income from the loan trail books associated with various aggregators. A telephone meeting was arranged where you used the alias 'Mark Clayton' and you told Mr Samuel you were selling the book because you were terminally ill. This was a lie.

85 After extensive negotiations, Mr Samuel made an offer to purchase a loan trail book. You accepted his offer and advised him that a 10% deposit was required. You informed him that the deposit would be held in trust and was fully refundable and you provided a 'heads of agreement' document which Mr Samuel duly signed and returned to you.

86 The loan trail book had previously been owned by Commercial Finance Solutions. They had previous dealings with you as they had considered using you as a broker, but nothing eventuated. This is how the various documents relating to this loan trail book came into your possession. Commercial Finance Solutions certainly did not give you permission to sell their loan trail book.

87 On 19 January 2015, Mr Samuel paid a deposit of $32,893.97 into your nominated bank account. You withdrew this money and spent it on private school fees for your three children's education and other personal expenditure items.

88 Mr Samuel's attempts to meet with the broker proved unsuccessful, as there was no genuine vendor. You gave him false excuses, including that the seller

had passed away due to a heart attack, and that his wife had a mental breakdown and suffered a stroke. You failed to provide any evidence that the loan trail book was genuinely for sale.

89 Mr Samuel made his own enquiries of the relevant aggregator and discovered that there was no broker selling a loan trail book at that time. You continued the charade of purporting to organise a meeting with the vendor which could never occur. Mr Samuel cancelled the purchase and demanded the refund of his deposit. This you failed to do and $32,893.97 remains outstanding.

90 Charge 3

91 The victims in respect of this charge, Andrew Moore and Luke Star, were finance brokers operating a business in Sydney. They also received an unsolicited email from you advertising loan trail books for sale, under the alias of 'Mark Clayton'.

92 They made enquiries with you about purchasing a loan trail book, and you made false representations purporting to be an agent selling loan trail books on behalf of mortgage brokers. You sent though documentation similar to other offences to add authenticity to the transaction including a sample loan trail book, which you said was for the Sydney region. Negotiations followed, and you lied to the prospective purchasers by telling them that the seller was suffering from cancer and looking to sell quickly.

93 In February 2015, the victims made an offer to purchase the loan trail book, which you accepted. You made the same arrangements as you had on previous occasions and requested payment of a deposit. Once again, you provided documents which stated that any deposit paid would be fully refundable.

94 On 4 February 2015, Mr Moore and Mr Star paid an initial deposit of $10,000 into your nominated bank account. Over the two days following you dispersed most of these funds on personal expenditure.

95 Attempts by the victims to meet with the seller were unsuccessful as again there was no genuine seller. Nonetheless, as a result of your continuing deception of them, Mr Moore and Mr Star paid further deposits of $11,553.03 and $5000.00. These sums you withdrew in cash and made payments to your children's private school.

96 Further attempts by Mr Moore and Mr Star to meet with the seller were unsuccessful, and they sought a refund of their deposit monies. You agreed to refund these amount and you sent them a false bank transfer receipt which purported to show the repayment of the total deposit. However, no funds were ever repaid by you and the victim's total loss is $26,553.03, which remains outstanding. I note this charge is a rolled-up charge which covers the three deposit payments covering the period 4 to 11 February 2015.[14]

97 The total amount defrauded by you in committing the offences in charges 1, 2 and 3 on this indictment is $109,447.

98 *The Westpac matter (Indictment G10711001.1 – Charges 4, 5, 6 and 7)*

99 Charges 4 to 7 relate to fraudulent credit account applications made by you to the Westpac Banking Corporation ('Westpac').

100 *Charge 4*

101 On 17 September 2015, you applied for a credit card with a credit limit of $25,000 under the name Mark William Logie. You provided a false monthly income figure of $120,000. You nominated the Westpac branch in Wonthaggi as the card delivery location.

102 The bank's procedures required that before the credit card could be activated, you had to attend a branch and provide a copy of a valid identity document and proof of your income.

[14]See *R v Jones* [2004] VSCA 68 [12]–[13] (Charles JA, Bongiorno AJA agreeing), [23] (Phillips JA); *R v Beary* (2004) 11 VR 151, 156–157 [11]–[14] (Callaway JA); *Reid v The Queen* (2014) 42 VR 295, 307–308 [73]–[74] (Priest JA, Maxwell P and Whelan JA agreeing).

103 On 28 September 2015, you attended at the Westpac branch in Wonthaggi where you provided a staff member with a copy of what purported to be your 2015 notice of assessment issued by the Australian Taxation Office in the name of 'Mr Mark W Logie'. This notice of assessment displayed the false taxable income figure of $1,371,850 as proof of your income. Based on the false representation you made to Westpac the credit card account was then activated.

104 On 10 September 2015, you applied for another credit card account with a credit limit of $25,000. Prior to 17 September 2015, you had attempted to collect this card at the Westpac branch in Wonthaggi. However, you were unsuccessful owing to the fact that you did not have with you at the time correct proof of income documents.

105 On 9 October 2015, you completed an application for a 'flexi loan' in relation to a deposit you wanted to pay on a property you were considering purchasing in South Yarra. This application was submitted on your behalf using the same personal and income details that had previously been provided to the bank in relation to the two credit cards. This application was approved on 12 October 2015 and a loan account in the sum of $25,000 was activated, thereby giving you access to those funds.

106 These facts and circumstances give rise to charge 4 on the indictment. Schedule B to the indictment makes clear that the $75,000 is comprised of the total credit limits on the two credit cards and the loan account. Accordingly this is also a rolled-up charge.[15]

107 So far as the credit cards and loan account are concerned, funds were drawn against them by you shortly after they were approved and all credit was expended by you on personal expenses. These amounts remain unpaid.

[15]See above footnote 12.

108 Charges 5, 6 and 7

109 Charges 5, 6 and 7 on the indictment relate to fraudulent car loan applications made by you to Westpac. On 8 October 2015, you purchased a 2015 Land Rover Discovery sport station wagon from Berwick Jaguar Land Rover for $68,411.

110 In order to fund this purchase you applied for a loan in this amount from Westpac under the identity of 'Mark Logie'. Once again, as part of the loan application process you had to provide proof of income documents. The documents relied upon by the bank were those you previously provided, namely the 2015 notice of assessment issued by the Australian Taxation Office and the 2014 and 2015 individual tax returns that were prepared by an accounting firm, but were not signed off or lodged by that firm.

111 Based on the fraudulent information you previously provided to Westpac, the loan application was approved. The loan was subsequently drawn down by you on 8 October 2015 and used to complete the purchase and take possession of the motor vehicle on that date. The payments required under the loan agreement had fallen into arrears by the time the motor vehicle was seized by police on 10 March 2016. These facts give rise to charge 5 on the indictment.

112 A second vehicle was fraudulently purchased by you under the identity of Mark Logie. This was a Mercedes Benz vehicle which was purchased by you on 22 October 2015 from a Mercedes Benz dealership in Mornington for $87,000.

113 In order to fund this purchase you applied for a loan in this amount from Westpac under the identity of 'Mark Logie'. Once again, the application was assessed and processed by an officer of the bank relying on the proof of income documents which you had previously provided to the bank.

114 Based on the fraudulent information you previously provided to Westpac, the loan application was approved. Settlement of this loan occurred on 22 October 2015, when the $87,000 was disbursed by Westpac to Mercedes Benz, Mornington, thereby allowing you to complete the purchase and take possession of the vehicle on that date. Once again, the loan repayments required under this loan agreement had fallen into arrears before the vehicle was seized by police on 10 March 2016. These facts give rise to charge 6 on the indictment.

115 Charge 7 relates to a third vehicle which you fraudulently purchased once again using the identity of 'Mark Logie'. This was a 2015 Range Rover sport wagon which you purchased on 14 January 2016 from a Land Rover dealership in Gardenvale for $154,300.

116 Again, in order to fund this purchase you applied for a loan from Westpac under the identity of 'Mark Logie' in the amount of $154,300. Once again, the officer dealing with the loan application did not require any additional proof of income documents on the basis that sufficient documents supporting your asserted income were already in bank's possession.

117 Based on the fraudulent information you previously provided to Westpac, the loan application was approved. Settlement of this transaction occurred on 14 January 2016, when funds were disbursed by Westpac to the Land Rover dealership, thereby completing the purchase and allowing you to take possession of the vehicle on 15 January 2016. Once again, payments under this loan agreement had fallen into arrears prior to the vehicle being seized by police on 10 March 2016. These facts give rise to charge 7.

118 The total amount fraudulently obtained from Westpac in relation to the purchase of these three motor vehicles is $309,711. The cars were recovered from you and sold by Westpac in mitigation of its loss. The actual loss to

Westpac is $192,794.60 in relation to both the credit cards and the three loan agreements.

119 It was accepted by your counsel that the preparation by the accountants of the false income tax returns in the name of 'Mark Logie' and their lodgement with the ATO was done by you in order to obtain a notice of income tax assessment which was based on them and that this was part of an elaborate scheme which, at the time, you envisaged would ultimately end up with Westpac being defrauded. Accordingly, there was extensive planning on you part in committing the offences which comprise the Westpac matter.

120 You were arrested and interviewed by police on 10 March 2016 in relation to the Westpac and other matters. You made no admissions and denied any wrongdoing during the record of interview.

121 Summary charge 2

122 This charge relates to you being issued with a marine licence in the name of 'Mark Logie' to assist you in committing the frauds on Westpac.

123 On 10 September 2015, you made an application for a marine licence at VicRoads in Leongatha. You completed an application form using the alias 'Mark Logie' and you provided a false address. Although there was a blank section to provide details relating to any previous names, you left this section blank.

124 You also provided false information by denying that you had ever held a Victorian driver licence or permit, had ever registered a motor vehicle or vessel in Victoria, or had ever committed a driving offence in Victoria. In fact you held a full Victorian driver licence in the name 'Mark Whittingham', had previously registered a 2015 Jeep wagon in that name, and you had accrued 12 penalty infringement notices relating to traffic offences in the name 'Mark Whittingham', which occurred between 2000 and 2014.

125 Based on the false information you provided on the application form, you were issued with a marine licence under the name ‘Mark Logie’.

126 Summary charge 10

127 Summary charge 10 (as amended) alleges that at Wonthaggi between 28 September 2015 and 14 January 2016 you committed an indictable offence, namely obtaining a financial advantage by deception, whilst on bail. This is a rolled-up charge covering the four offences you committed in charges 4, 5, 6 and 7 on indictment G10711001.1 (the Westpac matters). I note that charge 4 is itself a rolled-up charge covering three separate criminal acts committed by you.[16]

128 During the period charged you were on bail for the earlier present offences. So far as this offence is concerned, the relevant chronology is as follows:

129 On 6 February 2015, you were charged with the loan trail book and rent roll offences.

130 On 6 March 2015, your bail was revoked and you were remanded in custody in relation to those charges.

131 On 17 July 2015, you were granted bail and you were released on bail on 24 July 2015.

132 On 28 September 2015, you committed the actus of the first offence which is rolled up in charge 4[17] as part of the Westpac matters. Your offending against Westpac continued until 14 January 2016 — a period of nearly four months — and comprised six discrete criminal acts. You were arrested and again remanded in custody on 10 March 2016.

133 Since you will be sentenced separately on related summary charge 10, you are not to be doubly punished for the Westpac matters. Accordingly, the circumstance that those offences were committed whilst you were on bail for

[16] Above [92].
[17] On Indictment G10711001.1.

other similar offending is not to be treated as an aggravating factor in sentencing you on the Westpac matters.

134 However, it does mean that the presumption of concurrency between sentences of imprisonment that normally applies does not apply in sentencing you on the Westpac charges.[18] Nonetheless, I must apply the totality principle generally in arriving at a just sentence overall.

135 Victim Impact

136 The Crown tendered five victim impact statements. It is evident that your offending conduct has had a profound effect on your victims that will continue beyond the conclusion of these proceedings.

137 Mr Spiroglu[19] described how he resorted to selling his home to keep his business afloat, and he worked hard to have it survive. Your offending came at a time when he was finding his feet in business and he committed his and his wife's savings in the belief that you were giving him an opportunity to grow his business. Since then, Mr Spiroglu's personal and work relationship with his wife suffered and it almost cost him his marriage. He has also lost real and genuine business opportunities, because his wife is not willing to take any more risks. As a result their business can no longer expand and grow.

138 Mr Bufano[20] described how he had owned his real estate company since he was 24 years old and now, at 55 years of age, his staff could not be sure if he could be trusted to transfer large sums of money. Although he has worked hard to regain their trust, there will always be some element of doubt hanging over him. Your offending conduct remains on his mind and he finds it difficult to sleep. He does not think he will be able to forget what you did.

139 Ms Monk[21] has singlehanded raised her daughter and planned to use her

[18] *Sentencing Act 1991* s 16(1A)(e) and 16(3C).
[19] Exhibit P3.
[20] Exhibit P4.
[21] Exhibit P5.

savings to buy a business to support her through her university education. However, most of her savings were lost and this has caused emotional and financial strain. She has lost the confidence to be able to purchase a rent roll or any other business and other honest opportunities have been lost.

140 Mr Weir[22] described the emotional impact of your offending, and how it affected his relationship with his girlfriend, as she offered money to pay the deposit. Mr Weir has been paying her back over the past six years. Immediately after your offending, he spent significant time in seeking assistance in retrieving money back before reporting the matter to police. He started a small business in 2010 and, as a result of your offending, he spent significant time on these matters, which was time not spent on the business or its clients. He is now reluctant to invest in what may become sound opportunities for his business.

141 Mr Samuel[23] described how he borrowed approximately $30,000 from his parents in order to purchase the non-existent mortgage trail book. He had to focus on repaying his parents, which meant he was no longer able to expand his business. His relationship with his parents deteriorated significantly and he suffered depression afterward. He felt he had let himself and his family down, and this further led to a breakdown in his relationship with his partner. He has been seeing a psychologist to address his mental wellbeing. He has lost his sense of trust in others.

142 No victim impact statement was prepared by your other victims. Nonetheless, where no victim impact statement has been tendered a sentencer may draw reasonable inferences regarding the likely impact of an offence upon any victim. I am satisfied that your other non-corporate victims are likely to have suffered in a similar manner to the others.

143 Offence seriousness

[22]Exhibit P7.
[23]Exhibit P13.

144 Taken overall your offending conduct is grave. Over a period of some 42 months you repeatedly defrauded corporate and non-corporate members of the Australian business community of their financial assets. The total amount you fraudulently obtained from all your victims across the three indictments is about $744,877 and the victims' total losses are about $528,070.[24]

145 Whilst over half of this loss fell on the Westpac Bank, it is not mitigating that your major victim is a large corporation.[25] I must not ignore the societal cost of offending against institutional victims.

146 Your crimes were sophisticated, well planned and executed and involved sustained fraudulent conduct on your part. Your motive for committing these crimes was to support yours and your family's lifestyle. Your offending also involved serious breaches of trust that you owed to your clients. I find you lack insight into your offending behaviour, its objective gravity and its effect on your victims.

147 Clearly, denunciation, general deterrence and just punishment must loom large in sentencing you. Specific deterrence and protection of the community also must be given significant weight. Moreover, I can only adopt a very cautious approach to your prospects of rehabilitation.

148 From when you commenced employment in 1985 until July 2012 you led a law-abiding life. You held a number of senior management positions, including state manager of ING and you then successfully ran you own business for about eleven years.

149 However, when your business was financially unable to support your increasingly extravagant lifestyle you became fraudulent. You committed these offences in order to support a lifestyle that involved you living in expensive houses in fashionable suburbs, you and your wife driving luxury

[24]See exhibit P9. This exhibit states the 'Total actual losses' to be $526,069.93 however, this appears to be an arithmetic error.
[25]*R v Machtas* (1992) 62 A Crim R 179, 182 (Gleeson CJ).

cars and your daughters attending a private girls' school. Your business was unable to support this extravagance, so you decided to defraud other hard working members of the community.

150 When your earlier fraudulent activities were detected, investigated and you were charged and released on bail, you were undeterred and went right back to committing further offences which, if anything, were more brazen. Your counsel did not cavil with this characterisation of your offending conduct. He accepted you were committing these offences to maintain a pretence to your family and friends that you were a successful businessman. Accordingly, I assess your moral culpability as being very high.

151 In the words of Vincent JA in *R v Arundell* you have engaged in 'repeated predatory behaviour, affecting through the commission of [these offences] … the economic welfare of individual victims and the general community'.[26] His Honour later observed that, so far as your status as a continuing criminal enterprise offender is concerned in relation to the relevant charges:[27]

> 152 [T]here is clearly a broader notion of the protection of the public also underlying these sets of provisions. Persons who by the commission of the required number of relevant offences have a demonstrated propensity to engage in serious criminal activity of a designated kind have been perceived as constituting a significant threat to the community which is entitled to protection through the sentencing process should they continue to offend.

153 Subsequent offences

154 You have no prior convictions, but you have committed a large number of subsequent offences and you are charged with committing the Westpac matters whilst on bail for the other offences committed by you in the present case (summary charge 10).

[26][2003] VSCA 69 [22] (Phillips CJ and Cummins AJA agreeing).
[27]Above [2].

155 At the plea hearing the Crown provided me with a document headed '7 x Summary Stream Matters'.[28] Following the plea hearing, with your consent, the Crown provided me with a 'Report of Charges in Consolidated Case' heard at the Moorabbin Magistrates' Court on 5 October 2016 and certified extracts in relation to the disposal of those charges.[29]

156 At the Moorabbin Magistrates' Court on 5 October 2016 you pleaded guilty to 32 charges of obtaining property by deception, three charges of obtaining a financial advantage by deception and one charge of committing an indictable offence while on bail ('the subsequent offences'). You were convicted and sentenced to a 6 months' aggregate sentence of imprisonment and you were ordered to pay compensation in a total sum of $27,739.00. Pre-sentence detention of 170 days was declared.

157 The subsequent offences were committed by you between 20 February 2014 and 2 January 2015. The offences for which you are before me were committed between 27 July 2012 and 14 January 2016. Accordingly, the subsequent offences were committed during the period covered by the present offences. The subsequent offences were committed after the two Weir offences,[30] the seven rent roll offences[31] and the Augello loan trail book offence[32] ('the earlier present offences') and the last of the subsequent offences was committed some 17 days to two years before the Samuel and Libero Finance loan trail book offences[33] and the Westpac matters[34] ('the later present offences').

158 According to the Crown document headed '7 x Summary Stream Matters,' the matters dealt with at Moorabbin Magistrates' Court on 5 October 2016 were a consolidation of seven sets of charges laid by six informants. The majority of

[28]Exhibit P12.
[29]Exhibit P13.
[30]Indictment number F10472832.1B charges 34 and 35.
[31]Indictment number F10472832.2AA.
[32]Indictment number G10711001.1 charge 1.
[33]Indictment number G10711001.1 charges 2 and 3.
[34]Indictment number G10711001.1 charges 4, 5, 6 and 7.

these offences comprised offending whereby you would advertise goods for sale on the Gumtree website. The victims would purchase goods advertised by you and deposit funds into your bank account to cover the purchase price. You never supplied the goods and kept the purchasers' money. You committed these offences by using your own name and two aliases.

159 Two charges relate to you fraudulently obtaining two BMW motor vehicles from a dealership in Brighton. You committed another offence by not paying for accommodation at a hotel in South Yarra amounting to $5,786.00. Yet another offence related to you purporting to purchase a house in Hampton, living there for six weeks under a contractual licence, and never paying the deposit. You used an alias in committing this crime.

160 While subsequent convictions cannot be taken into account in the same way as prior convictions can, they bear upon my assessment of your character and shed light on your risk of recidivism, which is relevant to the weight I give to specific deterrence and protection of the community in sentencing you for the present offences. They are also relevant to my assessment of your prospects of rehabilitation.[35]

161 It is clear that since July 2012 you have been a consistent and persistent fraudster, conducting numerous schemes to obtain money, goods or services from your innocent victims, to which you were not entitled. You have been and, in my opinion, remain a financial hazard to this community.

162 Overall you fraudulent conduct falls into three time periods:

163 (1) the earlier present offences from 25 July 2012 to 16 August 2013;

164 (2) the subsequent offences from 20 February 2014 to 2 January 2015; and

[35]See *R v Rumpf* [1988] VR 466, 475 (McGarvie J, Young CJ and Murray J agreeing); *Alexandros v Birchell* (2000) 31 MVR 307, 310–1 [15], [18] (Smith J); *DPP v Rongonui* (2007) 17 VR 571, 580 [37] (Maxwell P); *Bellizia v The Queen* [2016] VSCA 21 [75], [77]–[78] (Santamaria JA).

165 (3) the later present offences from 19 January 2015 to 14 January 2016.

166 This chronology is relevant to how I apply the totality principle in sentencing you on the present offences and the weight I give to delay as a mitigating circumstance in your case.

167 At the time of your appearance in the Moorabbin Magistrates' Court you were on remand for the earlier present offences. Since 170 days' pre-sentence detention was declared by the magistrate in relation to those charges, and you were under sentence for a further 10 days, there are 180 days during which you were held in custody on the present charges which is not declarable as pre-sentence detention in this case.[36]

168 Moreover, by reason of the delay in bringing the present offences to trial, which is no one's fault, you have lost an opportunity to have some of the six months' aggregate sentence imposed in the Moorabbin Magistrates' Court served concurrently with the sentences I will impose in this case. I take both these matters into account in your favour under the totality principle by applying the principles in *Mill v The Queen*.[37]

169 Personal circumstances

170 You are presently aged 49 years[38] and you were aged between 42 and 46 years at the time of committing these offences.

171 You were born and raised in Melbourne by your mother, who worked for Telecom, as your parents had divorced and your father had remarried. Your maternal grandmother and a paternal aunt provided significant support to you during your childhood. They are both deceased.

172 Your mother passed away in 1990, when you were aged about 21 years and

[36] *Sentencing Act 1991* s 18(2)(d); *R v Broad* [1999] 3 VR 31; *Tsang v The Queen* (2011) 35 VR 240, 275–6 [169] (Nettle and Neave JJA and Sifris AJA) ('*Tsang*').
[37] (1988) 166 CLR 59; *Tsang* 276–8 [172]–[177].
[38] Date of birth is 23 October 1969.

your father died in 1995. You have had no male role model in your life. You first met your father when you were ten years old, but you had little or no contact with him. You have no full siblings, only half-siblings on your father's side, however you have had no contact with them. You became close to and assisted your mother's defacto partner to obtain a home, however as a result of committing these offence you are estranged from him also.

173 You met your wife when you both were working at the State Bank of Victoria in 1990. You married in 1993 and you have three daughters and one son together.

174 Your counsel submitted that you are socially isolated as a result of the current offending. You relationship with your wife and adult children is somewhat 'strained'. You have not seen any of your children since about March 2017, although you do have some telephone contact with your son. Indeed, it appears you have no family support whatsoever.

175 You completed your primary school education at King Street Primary School in West Melbourne. Despite your interest in the humanities, your mother compelled you to pursue a trade at Footscray Technical College, where you completed the equivalent of year 11. You were not interested in becoming a tradesperson and for this reason you felt somewhat different from the other students at the college. It was your ambition to study for a university degree, but this never happened.

176 In your younger years you participated in sport. You represented your school in tennis for four years and you played with the North Melbourne cricket club, playing in their under 16s team. You also were involved in the North Melbourne football club cheer squad.

177 You have maintained consistent employment, working primarily in the banking and finance sector. You first worked at Myer Melbourne as a salesperson and trainee manager for approximately five years before obtaining a clerkship with

the State Bank of Victoria, which later became the Commonwealth Bank. You were employed in home lending and as an integration officer. You were later employed with the National Australia Bank as a credit officer and a settlements clerk. At Aussie Home Loans you were employed between 1995 and 1996 as a credit and lending officer.

178 It was working in this role that you realised that you had developed a skillset that enabled you to advise customers about home loans. You became very involved in your work, working late hours to your wife's dissatisfaction.

179 From 1996, you moved into a number of managerial roles at the Bank of Melbourne and Westpac. You continued with home lending and established relationships with real estate agents who, in turn, would refer clients to you. You were appointed the state manager for Victoria and Tasmania at ING.

180 In 1999 you purchased an interest in part of the Nelson Alexander Real Estate Group and became a director of the group. You became a mortgage broker with a stable of over 100 real estate agents. However, this venture was not successful.

181 By the early 2000s, you had developed an extensive loan trail book, and with the growing prominence of online advertising for homes, you invested in this space and sold your first loan trail book. The global financial crisis put strain on your business, but you turned your company of home loan selection services into 'Lead Search', wherein you became the sole director and offered to provide leads to brokers. This venture was successful and you were providing up to 200 leads per day. You went on to establish Buy A Trail and Connection Blue up until 2014. The Crown conceded that these were legitimate businesses conducted by you.

182 While you were in custody on remand at the Melbourne Remand Centre you became a peer educator, conducting inductions for new inmates and assisting those in need of help with legal matters and housing. In this role you assisted

the Salvation Army. You also completed a food handling course and a drug and alcohol peer educator training program conducted by Caraniche.[39]

183 At Marngoneet Correctional Centre you have been a property billet assisting with property movement and clothing inmates. This is a responsible and trusted position.

184 You were subject to lockdown during the prison riots. You were also subject to lockdown for your protection after being bashed for being 'a dog'.[40] Consequently, as an aspect of the custodial hardship you have suffered whilst being on remand for the present matters, I have taken into account in your favour the periods you have spent in lock-down both before and after your appearance in the Magistrates' Court in October 2016.[41] I will make some allowance for the custodial hardship you have suffered on account of these measures.

185 Mitigating circumstances

186 The mitigating circumstances relied upon by your counsel are your pleas of guilty, your prior good character and excellent work history, the effects of delay and the rehabilitative efforts you have undertaken whilst you have been on remand in custody.

187 As at 4 July 2017, when I conducted my first directions hearing in this matter, you faced a plea indictment and three trial indictments comprising some 56 charges of obtaining or attempting to obtain a financial advantage by deception. At that time it was envisaged that there would be three trials, lasting about six months and involving approximately 133 witnesses, and a plea. The three trials were, more or less, split into the loan trail book trial, the rent roll trial and two other charges known as the Kahan and Hall trial.[42] The

[39]See exhibit A3.

[40]See exhibit A2.

[41]It seems to me that, given the PSD declarable by me cannot include the 170 days PSD declared by the magistrate, his Honour's attempt to make allowance for the 28 days you spent in lockdown up to October 2016 by doubling the 28 days and declaring 56 days PSD, has ultimately proved illusory.

[42]The trial in the Kahan and Hall matter (Indictment no. F10472832.2B), comprising two charges of obtaining a financial

plea was to involve, as it ultimately did, three loan trail book charges and the four Westpac charges. This in itself was a significant reduction from the very large number of charges on which you were originally committed to stand trial on 17 August 2016.

188 You pleaded guilty at a relatively late stage in the proceedings; indeed in respect of nine of the charges, on the sixth day of the loan trail book trial . A plea to the three loan trail book charges and the four Westpac charges had been indicated at a much earlier stage in the proceedings. I note that the loan book trial followed 22 days of pre-trial hearings including numerous Basha hearings.

189 In light of the Crown's leading no evidence in relation to 34 of the 36 charges you faced in the loan trail book trial,[43] discontinuing or not proceeding with a significant number of the charges you originally faced in the rent roll trial, and completely discontinuing the charges that were the subject of the Kahan and Hall trial, I am of the opinion that forensically your pleas of guilty were entered at the earliest reasonable opportunity.[44] Accordingly, I accept that yours are early pleas of guilty.

190 Your pleas have considerable utilitarian benefit in saving the time and cost of lengthy trials. They also indicate an acceptance by you of responsibility for your offending conduct and your willingness to facilitate the course of justice. However, whilst you are undoubtedly regretful for the situation in which you find yourself, there is no evidence before me of remorse beyond what is reflected in your pleas. There is insufficient evidence before me to make a finding in your favour that you demonstrate true contrition and remorse.[45]

advantage by deception, commenced before me on 18 September 2017, when a jury was empanelled and the accused pleaded 'not guilty' to both charges. For reasons that are not presently relevant, the jury was discharged without verdict on 25 September 2017. The Director of Public Prosecutions discontinued these proceedings pursuant to s 177 of the *Criminal Procedure Act 2009* on 6 February 2018.

[43]Pursuant to s 241(2) of the *Criminal Procedure Act 2009* I discharged the jury from delivering verdicts on the remaining charges and instead I directed that entries of not guilty be made on the record in respect of those charges.

[44]*Atholwood v The Queen* (1999) 109 A Crim R 465, 468 (Ipp J); *Cameron v The Queen* (2002) 209 CLR 339, 345–6 [20]–[22] (Gaudron, Gummow and Callinan JJ).

[45]See *Barbaro v The Queen* (2012) 226 A Crim R 354, 364–365 [32]–[38] ((Maxwell P, Harper JA and T Forrest AJA);

191 There has been considerable delay in your case. Some of this can be attributed to your decisions to apply to change your pleas in relation to the Westpac charges,[46] your decision apply for a deferral of sentence[47] and the issue of numerous subpoenas by you.[48] You have also changed your legal practitioners, both counsel and solicitors, on a number of occasions, which added considerably to the delay in concluding these matters. Nonetheless, I accept that these matters have been hanging over you for a lengthy period of time and this has been a considerable burden to you, particularly in light of the number of days you have spent in lock-down whilst in custody.[49]

192 I accept you are a person of otherwise prior good character, who has been constantly employed and a hard worker since you left school. You have been a family man and a contributor to the community. This entitles you to some leniency. However, the nature of your crimes requires 'that general deterrence is a particularly significant sentencing consideration and that good character cannot be given undue significance as a mitigation factor, and plays a lesser part in the sentencing process'.[50] Moreover, your subsequent offending also requires me to give less weight to this circumstance.[51]

193 So far as your prospects of rehabilitation are concerned, I can only adopt a very cautious approach in light of the extent and duration of your offending conduct, your subsequent offending and the fact you committed the later present offences while you were on bail for the earlier present offences. Although, I accept that whilst in custody you have taken some positive steps to turn your life around, it is concerning that on your release from custody you will likely have no family or other support.

194 For similar reasons, and because I cannot find you present a low risk of re-

Lyddy v The Queen [2019] VSCA 35 [62]–[64] (Kyrou JA and Taylor AJA).

[46] *DPP v Whittingham,* Application to Change Plea, Reasons for Ruling [2019] VCC 83.

[47] *DPP v Whittingham,* Reasons for Ruling on Deferral of Sentence [2019] VCC 259.

[48] *DPP v Whittingham,* Reasons for Ruling on Return of Subpoenas [2019] VCC 258.

[49] See exhibit A2.

[50] *DPP (Cth) v Gregory* (2011) 34 VR 1, 15 [53] (Warren CJ, Redlich JA and Ross AJA) (citations omitted).

[51] See above [136].

offending, I must give significant weight to specific deterrence and protection of the community in sentencing you for these offences.

195 Application of sentencing principles

196 I have had regard to current sentencing practices in relation to the charge of obtaining a financial advantage by deception in light of the decision of the High Court of Australia in *DPP v Dalgliesh (a Pseudonym)*.[52] I have considered the cases referred to me by the parties[53] and others concerning current sentencing practices in relation to this offence.

197 It is difficult to gauge more than a very general yardstick from so-called 'comparable cases', given the wide range of offending conduct which can constitute this offence and the myriad of personal circumstances pertaining to individual offenders. Nonetheless, to the extent that I have been able to gain any assistance from comparable cases, I have sought to do so in your case.

198 The basic purposes for which a court may impose a sentence are just punishment, deterrence, both specific and general, rehabilitation, denunciation and protection of the community. In sentencing you, I must have regard to a range of factors, such as the seriousness of the offences, your culpability for them, the effect on your victims and your personal circumstances.

199 I am required to balance the interests of the community in denouncing criminal conduct with the interests of the community in seeking to ensure that, so far as is possible, you are rehabilitated and reintegrated into society.

200 General deterrence and denunciation are very important sentencing considerations for these offences. Whilst just punishment, general deterrence and denunciation must be given significant weight in my instinctive synthesis, I am of the view, in your case, that specific deterrence and protection of the

[52](2017) 91 ALJR 1063.

[53]*R v Nguyen* [2011] VSC 529 (King J); *Jackson v The Queen* [2011] VSCA 338 (Ashley and Weinberg JJA); *R v Huynh* [2014] VSC 53 (Dixon J); *Gianello v The Queen* [2015] VSCA 205 (Whelan and Beach JJA).

community also needs to be given significant weight. Moreover, I can only adopt a cautious approach in assessing your prospects for rehabilitation.

201 I am of the view that the purposes for which these sentences are imposed cannot be achieved by imposing sentences that do not involve your confinement.[54]

202 I have sought to give effect to the totality principle both as between charges that are before me and in relation the aggregate sentence you received in the Magistrates' Court for the subsequent offences, while giving effect, as best I can, to the provisions of s 16(3C) of the *Sentencing Act 1991*.

[54] *Sentencing Act 1991* (Vic) s 5(4).

203 Stand up Mr Whittingham

204 On Indictment number F10472832.1B you are convicted and sentenced as follows:

205 On charge 34 – 2 months' imprisonment

206 On charge 35 – 3 months' imprisonment

207 Charge 35 is the base sentence and I direct that 1 month of the sentence imposed on charge 34 be served cumulatively on the sentence imposed on charge 35 – making a total effective sentence on that indictment of 4 months' imprisonment.

208 On Indictment number F10472832.2AA you are convicted and sentenced as follows:

209 On charge 1 — 6 months' imprisonment

210 On charge 2 — 4 months' imprisonment

211 On charge 3 — 10 months' imprisonment

212 On charge 4 — 21 months' imprisonment

213 On charge 5 — 4 months' imprisonment

214 On charge 6 — 6 months' imprisonment

215 On charge 7 — 2 months' imprisonment

216 Charge 4 is the base sentence and I direct that 2 months of the sentence imposed on charge 1, 1 month of the sentence imposed on charge 2, 4 months of the sentence imposed on charge 3, 1 month of the sentence imposed on charge 5, 2 months of the sentence imposed on charge 6 and 1 month of the sentence imposed on charge 7 be served cumulatively upon each other and on the sentence imposed on charge 4 – making a total effective sentence on that indictment of 32 months' imprisonment.

217 On Indictment number G10711001.1 you are convicted and sentenced as follows:

218 On charge 1 — 12 months' imprisonment

219 On charge 2 — 9 months' imprisonment

220 On charge 3 — 6 months' imprisonment

221 On charge 4 — 15 months' imprisonment

222 On charge 5 — 13 months' imprisonment

223 On charge 6 — 18 months' imprisonment

224 On charge 7 — 24 months' imprisonment

225 Charge 7 is the base sentence and I direct that 4 months of the sentence imposed on charge 1, 3 months of the sentence imposed on charge 2, 2 months of the sentence imposed on charge 3, 4 months of the sentence imposed on charge 4, 3 months of the sentence imposed on charge 5 and 4 months of the sentence imposed on charge 6 be served cumulatively on each other and on the sentence imposed on charge 7 – making a total effective sentence on that indictment of 44 months' imprisonment.

226 On related summary charge 2 (obtain a marine licence by false statement) you are convicted and fined $1000 and I order that you pay the amount outstanding to the Registrar of the County Court today. If the fine is not paid to the Registrar of the County Court on the day this order is made, the fine will be referred to the Director, Fines Victoria for collection and management under the *Fines Reform Act 2014*.

227 On related summary charge 10 (commit indictable offence whilst on bail) you are convicted and sentenced to 6 weeks' imprisonment.

228 I further direct that 2 months of the total effective sentence imposed on Indictment number F10472832.1B and 13 months of the total effective sentence imposed on Indictment number F10472832.2AA and I month of the sentence imposed on related summary charge 10 be served cumulatively with the total effective sentence imposed on Indictment number G10711001.1.

229 This makes an overall total effective sentence of 5 years' imprisonment and I fix 3 years and 4 months (or 40 months) as the period during which you are not eligible to be released on parole.

230 I declare a period of 1053 days (not including this day) as the period during which you have been held in custody in relation to these proceedings, which is to be reckoned as a period of imprisonment already served under the sentences I have imposed on you, and I direct that the fact that declaration was made and its details be noted in the records of the court.

231 Pursuant to s 6AAA of the *Sentencing Act 1991* I state that the sentence I would have imposed on you but for your pleas of guilty would have been an overall total effective sentence of 7 years' imprisonment with a non-parole period of 5 years' imprisonment.

232 Pursuant to s 6J of the *Sentencing Act 1991* I declare that you have been sentenced as continuing criminal enterprise offender on charge 4 on Indictment number F10472832.2AA and charges 1, 5, 6 and 7 on Indictment number G10711001.1 and I direct that that declaration be entered in the records of the court.

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